

## **Chapter 18**

### **ANATOMY OF A QUANTUM CASE**

#### **I. OVERVIEW:**

As part of this introduction, students should understand and think seriously about:

- A. Roles and perspectives of counsel.
- B. Factors in organizing the case.
- C. The contractor's burden.
- D. Methodology for identifying and quantifying appropriate adjustments.
- E. Certain special items that often comprise a contractor's claim.

#### **II. ROLES AND PERSPECTIVES OF COUNSEL**

- A. Determined by *our own perception* of:
  - 1. Respective client interests.
  - 2. Advocacy.
  - 3. Strengths and weaknesses.
  - 4. Intentions of opposing party.
- B. Personal experiences, prejudices and style may have a dramatic impact on case.

#### **III. FACTORS IN ORGANIZING THE CASE**

- A. Divide the Contractor's Claim into Component Parts.
  - 1. A contractor claim is really a series of smaller claims all added together. Each piece must stand on its own, in terms of being both legally permitted and factually supported.

2. Quantum case litigation requires analyzing each section of the contractor's claim separately. This leads to a more thorough examination and prevents overpayment regardless if the case is settled or litigated.
3. Develop and staff accordingly.
4. The Quantum Case Litigation Team. It is necessary to enlist the support of many individuals in both your defensive and offensive quantum case litigation efforts. These individuals will help you decipher the contractor's accounting documentation, as well as explain relevance in relation to contract performance.
  - a. DCAA Auditor.
  - b. Contracting Officer.
  - c. Program Manager/End User.
  - d. Contracting Officer's Representative (COR).
  - e. Project Managers, Site Inspectors, Project Engineers, Quality Assurance Representatives.

#### IV. THE CONTRACTOR'S BURDEN OF PROOF:

- A. The burden—a preponderance of the evidence standard—is on the party claiming the benefit of the adjustment. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (moving party “bears the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation”); Deval Corp., ASBCA Nos. 47132, 17133, 99-1 BCA ¶ 30,182 (holding that a contractor's clear entitlement to an equitable adjustment did not diminish the contractor's burden of proving the amount of such an adjustment).
- B. What must the party prove for quantum damages?
  1. Entitlement—the government did something that changed the contractor's costs, for which the government is legally liable. T.L. James & Co., ENG BCA No. 5328, 89-1 BCA ¶ 21,643.
  2. Causation—there must be a causal nexus between the basis for liability and the claimed increase (or decrease) in cost. Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252; Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255; Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991).

## **V. METHODOLOGY FOR IDENTIFYING AND QUANTIFYING APPROPRIATE ADJUSTMENTS**

### **A. STEP 1: Know the facts.**

1. Conduct thorough internal and external discovery.
2. Interview individuals with first-hand knowledge.
3. Review key Govt and contractor documents. There are many important contractor documents that will assist you in determining what really happened.
  - a. As-Bid Bill of Materials (BOM), and Final BOM.
  - b. Production Schedules.
  - c. As-Bid Bid Rates (Overhead Rates).
  - d. Actual Overhead Rates.
  - e. Expected and Actual Direct Costs—for the specific contract and plant-wide.
  - f. Expected and Actual Labor Amounts—for the specific contract and plant-wide.
  - g. Material Invoices for Major Component Parts.
  - h. CAS Disclosure Statement.
4. Determine the true root causes of the contractor's extra costs.
  - a. Was the job as a whole underbid?
  - b. Did the contractor change planned facilities?
  - c. Did the contractor purchase cheap and unworkable component parts?
  - d. Did the contractor select subcontractors that were unable to perform?
  - e. Was there reliance upon less competent vendors?
  - f. Were there increases in material costs?

- g. Did the contractor change components for cost reasons? Did this in turn result in engineering problems? Did prior design work become worthless? Did this in turn cause the need for redesign work, with more time and effort?
- h. Was there an overall lack of efficient organization?
- i. Did the contractor waste time recompeting components and vendors?
- j. What expenses were unrelated to the claimed causation?
- k. Did the contractor order surplus material (for potential options and possible commercial jobs)?

B. STEP 2: Eliminate any costs claimed by contractor that are contrary to cost/CAS principles.

- 1. Generally. The government does not pay all the costs actually incurred and/or claimed by a contractor. Applying Cost/CAS principles entails analyzing each part of the total claim for allowability, allocability, reasonableness, and CAS compliance.
- 2. Allowability. The government does not pay certain costs, even if they were actually incurred, reasonable in nature and amount, in furtherance of the particular contract, and properly accounted for. The contract itself, FAR Part 31.2, and case law all establish that certain costs are not allowable.

a. Profit.

- (1) A contractor is not always entitled to profit as part of its claim. In many instances, profit is expressly not allowable. The rationale for lack of profit is that there is no change in the underlying work and/or risk—only the period in which performance occurs.
- (2) Work stoppage adjustments. These adjustments preclude profit as part of the price increase. Contract clauses providing for such profit-less adjustments are:
  - (a) FAR 52.242-14, Suspension of Work. See Thomas J. Papatomas, ASBCA No. 51352, 99-1 BCA ¶ 30,349; Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27457.

- (b) FAR 52.242-17, Government Delay of Work. NB: an unabsorbed overhead claim is essentially one for the indirect costs of a government-caused delay, and therefore, profit is also precluded. ECC Int'l Corp., ASBCA Nos. 45041, 44769, 39044, 94-2 BCA ¶ 26,639.
- (3) Labor standards adjustments. Adjustments under labor standards clauses include only the increased costs of direct labor (and preclude both profit and overhead). See FAR 52.222-43; FAR 52.222-44 (Fair Labor Standards Act and Service Contract Act); KIME Plus, Inc., ASBCA No. 38840, 91-3 BCA ¶ 24,045; American Business Communications, Inc., ASBCA No. 48718, 96-2 BCA ¶ 28,469. But see BellSouth Communications Syss., Inc., ASBCA No. 45955, 94-3 BCA ¶ 27,231 (holding that a price adjustment under the Davis-Bacon Act (FAR 52.222-6) did not preclude profit).
- (4) Equitable adjustment. By contrast, for equitable adjustments a contractor is generally entitled to profit as part of its claim for additional performance costs. United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942). Equitable adjustments are based on contract clauses granting that remedy, including: FAR 52.243-1 thru -7 (Changes); FAR 52.245-2, -4, -5, and -7 (Government Furnished Property); FAR 52.248-1 thru -3 (Value Engineering); and FAR 52.236-2 (Differing Site Conditions).
- (5) Convenience Termination Settlements. A contractor is not entitled to profit as part of a termination for convenience settlement proposal if the contractor would have incurred a loss had the entire contract been completed. FAR 49.203. The government has the burden of proving that the contractor would have incurred a loss at contract completion. R&B Bewachungs, GmbH, ASBCA No. 42214, 92-3 BCA ¶ 25,105; Specon, Inc., ASBCA No. 29137, 86-3 BCA ¶ 19,163. A contractor is not entitled to anticipatory profits as part of a convenience termination settlement proposal. Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979).

b. Attorney's Fees.

- (1) Costs related to prosecuting and defending claims and appeals against the federal government are unallowable. FAR 31.205-47; Singer Co. v. United States, 215 Ct. Cl. 281, 568 F.2d 695 (1977); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 97-2 BCA ¶ 29,252 modified by 98-1 BCA ¶ 29,653; Marine Hydraulics Int'l, Inc., ASBCA No. 46116, 94-3 BCA ¶ 27,057; P&M Indus., Inc., ASBCA No. 38759, 93-1 BCA ¶ 25,471. This is consistent with the general rule that attorneys' fees are not allowed in suits against the United States absent an express statutory provision allowing recovery. Piggly Wiggly Corp. v. United States, 112 Ct. Cl. 391, 81 F. Supp. 819 (1949).
- (2) The Equal Access to Justice Act, 5 U.S.C. § 504, authorizes courts and boards to award attorneys fees to qualifying prevailing parties unless the government can show that its position was "substantially justified." See, e.g., Midwest Holding Corp., ASBCA No. 45222, 94-3 BCA ¶ 27,138.
- (3) Costs incurred incident to contract administration, or in furtherance of the negotiation of the parties' disputes, are allowable. Bill Strong Enters. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995)(holding that when the genuine purpose of incurred legal expenses is that of materially furthering a negotiation process, such cost should normally be allowable); FAR 31.205-33 (consultant and professional costs may be allowable if incurred to prepare a demand for payment that does not meet the CDA definition of a "claim").
- (4) Legal fees unrelated to presenting or defending claims against the government are generally allowable. Bos'n Towing and Salvage Co., ASBCA No. 41357, 92-2 BCA ¶ 24,864 (costs of professional services, including legal fees, are generally allowable, except where specifically disallowed). But see Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999) (holding that legal expenses incurred unsuccessfully defending wrongful termination actions by employees who would not partake in contractor fraud were not recoverable).

c. Breach Damages. The contractor can recover common law breach of contract damages in certain very narrow situations.

- (1) A contractor may not assert a claim for breach of contract damages when there is a remedy-granting contract clause. Info. Syss. & Networks Corp., ASBCA No. 42659, 1999 ASBCA LEXIS 165 (Nov. 18, 1999) (holding that claim for breach damages barred by convenience termination clause); Hill Constr. Corp., ASBCA No. 49820, 99-1 BCA ¶ 30,327 (denying a breach claim for lost profits where the underlying changes were within the ambit of the Changes clause).
- (2) Situations where breach damages may be recovered include:
  - (a) Breach of a requirements contract. Bryan D. Highfill, HUDBCA No. 96-C-118-C7, 99-1 BCA ¶ 30,316.
  - (b) Bad faith termination for convenience. Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982).
  - (c) Government's failure to disclose material information. Shawn K. Christensen, dba Island Wide Contracting, AGBCA No. 95-188-R, 95-2 BCA ¶ 27,724.
- (3) Breach damages are measured under common law principles, although cost principles may apply. See AT&T Technologies, Inc. v. United States, 18 Cl. Ct. 315 (1989); Shawn K. Christensen, AGBCA No. 95-188R, 95-2 BCA ¶ 27,724.
  - (a) Consequential Damages. The general rule is that consequential damages are not recoverable unless they are foreseeable and caused directly by the government's breach. Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295 (Fed. Cir. 1986); Land Movers Inc. and O.S. Johnson - Dirt Contractor (JV), ENG BCA No. 5656, 91-1 BCA ¶ 23,317 (no recovery of lost profits based on loss of bonding capacity; also no recovery related to bankruptcy, emotional distress, loss of business, etc.).

- (b) Compensatory Damages. A contractor whose contract was breached by the government is entitled to be placed in as good a position as it would have been if it had completed performance. PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (the measure of damages for failure to order the minimum quantity is not the contract price; the contractor must prove actual damages). Compensatory damages include a reliance component (costs incurred as a consequence of the breach), and an expectancy component (lost profits). Keith L. Williams, ASBCA No. 46068, 94-3 BCA ¶ 27,196.

d. Interest.

- (1) Pre-Claim Interest. Contractors are not entitled to interest on borrowings, however represented, as part of an equitable adjustment. FAR 31.205-20; Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); Tomahawk Constr. Co., ASBCA No. 45071, 94-1 BCA ¶ 26,312; Tayag Bros. Enters., Inc., ASBCA No. 42097, 94-3 BCA ¶ 26,962. This is consistent with the general rule that the United States is immune from interest liability absent an express statutory provision allowing recovery. Library of Congress v. Shaw, 478 U.S. 310 (1986).
- (2) Lost Opportunity Costs. The damages for the “opportunity cost of money” are unrecoverable as a matter of law. Envtl. Tectonics Corp., ASBCA No. 42,540, 92-2 BCA ¶ 24,902 (not only interest on actual borrowings, but also the economic equivalent thereof, are unallowable); Dravo Corp. v. United States, 219 Ct. Cl. 416, 594 F.2d 842 (1979).
- (3) Cost of Money. Contractors may recover facilities capital cost of money (FCCM) (the cost of capital committed to facilities) as part of an equitable adjustment. FAR 31.205-10. Among the various allowability criteria, a contractor must specifically identify FCCM in its bid or proposal relating to the contract under which the FCCM cost is then claimed. FAR 31.205-10(a)(2). See also McDonnell Douglas Helicopter Company d/b/a McDonnell Douglas Helicopter Systems, ASBCA No. 50756, 98-1 BCA ¶ 29,546.



- (4) Prompt Payment Act Interest. Under the Prompt Payment Act (31 U.S.C. §§ 3901-3907), the contractor is entitled to interest if the contractor submits a proper voucher and the government fails to make payment within 30 days.
- (5) Contract Disputes Act (CDA) Interest. A contractor is entitled to interest on its claim based upon the rate established by the Secretary of the Treasury, as provided by the Contract Disputes Act, 41 U.S.C. § 611. Interest begins to run when the contracting officer receives a properly certified claim (Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991)), or upon submission of a defectively certified claim that is subsequently certified. Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4506, 4518. Interest runs regardless of whether the claimed costs have actually been incurred at the date of submission of a claim. Servidone Constr. Co. v. United States, 931 F.2d 860 (Fed. Cir. 1991).
  - (a) A termination for convenience settlement proposal (FAR 49.206) is not initially considered a CDA claim, as it is generally submitted for purposes of negotiation. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996). Accordingly, a contractor is not entitled to interest on the amount due under a settlement agreement or determination. FAR 49.112-2(d); Ellett Constr., *supra*. If a termination settlement proposal matures into a CDA claim (once settlement negotiations reach an impasse), then a contractor is entitled to interest.
- (6) Payment of Interest. When the contracting officer pays a claim, the payment is applied first to accrued interest. Then the payment is applied to the principal amount due. Any unpaid principal continues to accrue interest. Paragon Energy Corp., ENG BCA No. 5302, 91-3 BCA ¶ 24,349.

e. Nonappropriated Fund (NAF) Claims.

- (1) The CDA does not generally apply to contracts funded solely with nonappropriated funds, with the exception of Army and Air Force, Navy and Marine Corps exchange contracts. 41 U.S.C. § 602(a). However, the government may choose to include a disputes clause in a NAF contract, thereby giving a contractor recourse to the disputes process.

- (2) For those NAF claims not under the CDA, a contractor is not entitled to interest on its claim to the contracting officer, or the appeal of its claim per the contractual disputes clause.
- (3) A contractor is not entitled to attorney's fees on its appeal of a denied claim, as the entitlement to EAJA applies only to appropriated fund contracts.

3. Allocability.

- a. A cost is allocable if incurred specifically for the contract; or the cost benefits both the contract and other work, and is distributed to them in reasonable proportion to the benefits received; or is necessary for the overall operation of the business. FAR 31.201-4. See Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999) (holding that attorneys fees incurred unsuccessfully defending wrongful termination actions resulted in no benefit to the contract and were not allocable); P.J. Dick, Inc., GSBICA No. 12415, 96-2 BCA ¶ 28,307 (finding that accounting fees were costs benefiting the contract).
- b. In certain instances (i.e., impact on other work), the contract appeals boards may ignore the principle of allocability. See Clark Concrete Contractors, Inc. v. General Servs. Admin., GSBICA No. 14340, 99-1 BCA ¶ 30,280 (holding that costs incurred on an unrelated project were recoverable because they were "equitable and attributable" by-products of agency design changes).

4. Reasonableness.

- a. Entitlement to an equitable adjustment or price adjustment does not provide the contractor with the authority to fleece the government. A contractor's additional costs must be reasonable—i.e., the expenses in both nature and amount must not exceed that which a prudent person would incur in the conduct of a competitive business. FAR 31.201-3.
- b. Reasonable in nature. Lockheed-Georgia Co., Div. of Lockheed Corp., ASBCA No. 27660, 90-3 BCA ¶ 22,957 (air travel to the Greenbrier resort for executive physicals unreasonable because competent physicians were available in Atlanta). Buying materials in anticipation of options that the government elected not to exercise.

- c. Reasonable in amount. DeMauro Constr. Co., ASBCA No. 12514, 73-1 BCA ¶ 9,830; Air Repair, GmbH, ASBCA No. 10288, 67-1 BCA ¶ 6,115.
- d. Profit. In determining the reasonableness of profit as part of an equitable adjustment, profit is calculated as:
  - (1) The rate earned on the unchanged work;
  - (2) A lower rate based on the reduced risk of equitable adjustments; or
  - (3) The rate calculated using weighted guidelines. See Doyle Constr. Co., ASBCA No. 44883, 94-2 BCA ¶ 26,832.

5. Compliance with CAS.

- a. Treat like costs in like manner: consistency. Were costs double-counted? Did the contractor charge like expenses both directly and indirectly?
- b. Measured in accordance with accounting standards. Contractors can determine costs by using any generally accepted cost accounting method that is equitably and consistently applied. FAR 31.201-1.

C. STEP 3: Apply standard for adjusting the contract price (“adjustment formula”).

- 1. Costs. “Costs” for adjustment formula purposes are the sum of allowable direct and indirect costs, incurred or to be incurred, less any allowable credits, plus cost of money. FAR 31.201-1. If it is an equitable adjustment, one must also calculate the profit on the allowable costs.
  - a. Direct Costs.
    - (1) A direct cost is any cost that is identified specifically with a particular contract. Direct costs are not limited to items that are incorporated into the end product as material or labor. All costs identified specifically with a claim are direct costs of that claim. FAR 31.202.
    - (2) Direct costs generally include direct labor, direct material, subcontracts, and other direct costs.

b. Indirect Costs.

- (1) Indirect costs are any costs not directly identified with a single final cost objective, but identified with two or more final cost objectives, or with at least one intermediate cost objective. FAR 31.203. There are two types of indirect costs:
- (2) Overhead. Allocable to a cost objective based on benefit conferred. Typical overhead costs include the costs of personnel administration, depreciation of plant and equipment, utilities, and management.
- (3) General and administrative (G&A). Not allocable based on benefit, but necessary for overall operation of the business. FAR 31.201-4.
- (4) Calculating indirect cost rates. The total indirect costs divided by the total direct costs equals the indirect cost rate. For example, if a contractor has total indirect costs of \$100,000 in an accounting period, and total direct costs of \$1,000,000 in the same period, the indirect cost rate is 10%.
- (5) Some agencies limit the recoverable overhead through contract clauses. Reliance Ins. Co. v. United States, 931 F.2d 863 (Fed. Cir. 1991) (court upheld clause which limited recoverable overhead for change orders).

2. Pricing Formula.

- a. The basic adjustment formula is the difference between the reasonable cost to perform the work as originally required, and the reasonable cost to perform the work as changed. B.R. Servs., Inc., ASBCA Nos. 47673, 48249, 99-2 BCA ¶ 30,397 (holding that the contractor must quantify the cost difference—not merely set forth the costs associated with the changed work); Buck Indus., Inc., ASBCA No. 45321, 94-3 BCA ¶ 27,061. See also Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994).
- b. Pricing adjustments should not alter the basic profit or loss position of the contractor before the change occurred. “An equitable adjustment may not properly be used as an occasion for reducing or increasing the contractor’s profit or loss...., for reasons unrelated to a change.” Pacific Architects and Eng’rs, Inc. v. United States, 203 Ct. Cl. 499, 508 491 F.2d 734, 739 (1974). See

also Westphal Gmph & Co., ASBCA No. 39401, 96-1 BCA ¶ 28194; Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 97-2 BCA ¶ 29,252 modified by 98-1 BCA ¶ 29,653 (holding that a contractor is entitled to profit on additional work ordered by the Army even though the original work was bid at a loss).

- c. Pricing Additional Work. Agencies price additional work based on the reasonable costs actually incurred in performing the new work. Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990). The contractor should segregate and accumulate these costs.
- d. Pricing Deleted Work.
  - (1) Agencies price deleted work based on the difference between the estimated costs of the original work and the actual costs of performing the work after the change. Knights' Piping, Inc., ASBCA No. 46985, 94-3 BCA ¶ 27,026; Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036. But see Condor Reliability Servs, Inc., ASBCA No. 40538, 90-3 BCA ¶ 23,254.
  - (2) When the government partially terminates a contract for convenience, a contractor is generally entitled to an equitable adjustment on the continuing work for the increased costs borne by that work as a result of a termination. Deval Corp., ASBCA Nos. 47132, 47133, 99-1 BCA 30,182; Cal-Tron Sys., Inc., ASBCA Nos. 49279, 50371 97-2 BCA ¶ 28,986; Wheeler Bros., Inc., ASBCA No. 20465, 79-1 BCA ¶ 13,642.
- e. Responsibility. Where the contractor shares the fault, it shares liability for the added costs. See Dickman Builders, Inc., ASBCA No. 32612, 91-2 BCA ¶ 23,989.

D. STEP 4: Examine adequacy of contractor's methods of proof.

- 1. Actual Cost Method. The actual cost method is the preferred method for proving costs. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).

- a. A contractor must prove its costs using the best evidence available under the circumstances. The preferred method is actual cost data. Cen-Vi-Ro of Texas, Inc. v. United States, 210 Ct. Cl. 684, 538 F.2d 348 (1976); Deval Corp., ASBCA Nos. 47132, 47133, 99-1 BCA 30,182.
- b. The contracting officer may include the Change Order Accounting clause, FAR 52.243-6, in a contract. This clause permits the contracting officer to order the accumulation of actual costs. A contractor must indicate in its proposal, which proposed costs are actual and which are estimates.
- c. Failure to accumulate actual cost data may result in either a substantial reduction or total disallowance of the claimed costs. Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990) (recovery reduced for unexcused failure to segregate); Togaroli Corp., ASBCA No. 32995, 89-2 BCA ¶ 21,864 (costs not segregated despite the auditor's repeated recommendation to do so; no recovery beyond final decision); Assurance Co., ASBCA No. 30116, 86-1 BCA ¶ 18,737 (lack of cost data prevented reasonable approximation of damages for jury verdict, therefore, the appellant recovered less than the amount allowed in the final decision).

## 2. Estimated Cost Method.

- a. Good faith estimates are preferred when actual costs are not available. Lorentz Brunn Co., GSBCA No. 8505, 88-2 BCA ¶ 20,719 (estimates of labor hours and rates admissible). Estimates are generally required when negotiating the cost of a change in advance of performing the work. Estimates are an acceptable method of proving costs where they are supported by detailed substantiating data or are reasonably based on verifiable cost experience. J.M.T. Mach. Co., ASBCA No. 23928, 85-1 BCA ¶ 17,820 (1984), aff'd on other grounds, 826 F.2d 1042 (Fed. Cir. 1987).
- b. If the contractor uses detailed estimates based on analyses of qualified personnel, the government will not be able to allege successfully that the contractor used the disfavored total cost method of adjustment pricing. Illinois Constructors Corp., ENG BCA No. 5827, 94-1 BCA ¶ 26,470.
- c. Estimates based on Mean's Guide must be disregarded where actual costs are known. Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036.

3. Total Cost Method.

- a. The total cost method is not preferred because it assumes the entire overrun is solely the government's fault. The total cost method calculates the difference between the bid price on the original contract and the actual total cost of performing the contract as changed. Servidone v. United States, 931 F.2d 860 (Fed. Cir. 1991); Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252; Santa Fe Eng'rs, Inc., ASBCA No. 36682, 96-2 BCA ¶ 28,281; Concrete Placing Inc. v. United States, 25 Cl. Ct. 369 (1992).
- b. The use of a total cost method is tolerated only when no other means are possible, when the reliability of the supporting documentation is fully substantiated, and when the contractor establishes the subsequent four factors:
  - (1) The nature of the particular cost is impossible or highly impracticable to determine with a reasonable degree of certainty;
  - (2) The contractor's bid was realistic;
  - (3) The contractor's actual incurred costs were reasonable; and
  - (4) The contractor was not responsible for any of the added costs. Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); WRB Corp. v. United States, 183 Ct. Cl. 409 (1968).

4. Modified total cost method.

- a. A modified total cost method involves use of a total cost method that the contractor has adjusted to account for other factors, usually because the original bid was not realistic, or because there were independent causes for certain extra costs. A modified total cost method of assessing damages or price adjustment may also be used only as a last resort in those extraordinary circumstances where no other way to compute damages is feasible. ECC Int'l Corp., ASBCA Nos. 45041, 44769, 39044, 94-2 BCA ¶ 26,639; Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991).
- b. With the exception of the modification, contractor must again establish the same four factors as with total cost claims. Olsen v.

Espy, 26 F.3d 141 (Fed. Cir. 1994); River/Road Constr. Inc., ENG BCA No. 6256, 98-1 BCA ¶ 29,334; Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255).

5. Jury Verdicts. Jury verdicts are not a method of proof, but a means of resolving disputed facts. Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990); Joseph Pickard's Sons v. United States, 209 Ct. Cl. 643 (1976); River/Road Constr. Inc., ENG BCA No. 6256, 98-1 BCA ¶ 29,334; Cyrus Contracting Inc., IBCA Nos. 3232, 3233, 3895-98, 3897-98, 98-2 BCA ¶ 29,755; Paragon Energy Corp., ENG BCA No. 5302, 88-3 BCA ¶ 20,959.
  - a. There is clear proof of injury;
  - b. No more reliable method exists. See Dawco Constr. Co. v. United States, 930 F.2d 872 (Fed. Cir. 1991) (actual costs are preferred; where contractor offers no evidence of justifiable inability to provide actual costs, then it is not entitled to a jury verdict); Service Eng'g Co., ASBCA No. 40274, 93-2 BCA ¶ 25,885; and
  - c. The evidence is sufficient for a fair approximation of the damages.

E. STEP 5: Examine adequacy of contractor's supporting documentation.

1. Generally. In order to sustain its burden of proof regarding the amount claimed, a contractor must submit adequate and material supporting documentation. Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255 (denying contractor's claim where claim was prepared by outside counsel, who did not testify, and unsupported by contractor's witnesses, who had no actual knowledge of how the claim was prepared).
2. Pertinent Inquiries. While not exclusive, the following questions aid in determining whether the claimed amount is adequately supported: Was the claim prepared and/or validated by the contractor's witnesses?; Can the contractor explain how the claim was derived?; Is it supported by contemporaneous records?; Are the contractor's submissions, especially with regard to historical information, consistent?; Does the contractor's treatment of costs adhere to its CAS disclosure statement?
3. Certification Requirements. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, § 2301, 108 Stat. 3243 (1994) amended 10 U.S.C. § 2410, Requests for Equitable Adjustment or Other Relief: Certification.
  - a. In DOD, a request for equitable adjustment that exceeds the simplified acquisition threshold (currently, \$100,000) may not be



paid unless a person authorized to certify the request on behalf of the contractor certifies that:

- (1) The request is made in good faith, and
  - (2) The supporting data is accurate and complete to the best of that person's knowledge. 10 U.S.C. § 2410(a).
- b. Similarly, after negotiating an agreement on a modification settling a request for equitable adjustment on a negotiated contract, the contractor must furnish a certificate of current cost and pricing data if the modification exceeds \$500,000 under the Truth in Negotiations Act. 10 U.S.C. § 2306(a).

## VI. SPECIAL ITEMS.

### A. Unabsorbed Overhead

1. Generally. A type of cost associated with certain types of claims is "unabsorbed overhead." Unabsorbed overhead has been allowed to compensate a contractor for work stoppages, idle facilities, inability to use available manpower, etc., due to government fault. In such delay situations, fixed overhead costs, e.g., depreciation, plant maintenance, cost of heat, light, etc., continue to be incurred at the usual rate, but there is less than the usual direct cost base over which to allocate them. Therm-Air Mfg. Co., ASBCA No. 15842, 74-2 BCA ¶ 10,818.
2. Contracts Types. Most unabsorbed overhead cases deal with recovery of additional overhead costs on construction and manufacturing contracts. The qualitative formula adopted in Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688, aff'd on recons., 61-1 BCA ¶ 2894, is the exclusive method of calculating unabsorbed overhead for both construction contracts (Wickham Contracting Co. v. Fischer, 12 F.3d 1574 (Fed. Cir. 1994)) and manufacturing contracts (West v. All State Boiler, Inc., 146, F.3d 1368 (Fed. Cir. 1998); Genisco Tech. Corp., ASBCA No. 49664, 99-1 BCA ¶ 30,145, mot. for recons. den., 99-1 BCA ¶ 30,324; Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255).
  - a. Under this method, calculate the daily overhead rate during the contract period, then multiply the daily rate by the number of days of delay.
  - b. To be entitled to unabsorbed overhead recovery under the Eichleay formula, the following three elements must be established:
    - (1) a government-caused or government-imposed delay,

- (2) the contractor was required to be on “standby” during the delay, and
- (3) while “standing by,” the contractor was unable to take on additional work.

Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); West v. All State Boiler, 146 F.3d 1368 (Fed. Cir. 1998); Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997); Altmayer v. Johnson, 79 F.3d 1129 (Fed. Cir. 1995); Mech-Con Corp. v. West, 61 F.3d 883 (Fed Cir. 1995).

- c. If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby. Further, a definitive delay precludes recovery “because ‘standby’ requires an uncertain delay period where the government can require the contractor to resume full-scale work at any time.” Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999).
- d. A contractor’s ability to take on additional work focuses upon the contractor’s ability to take on replacement work during the indefinite standby period. Replacement work must be similar in size and length to the delayed government project and must occur during the same period. Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); West v. All-State Boiler, 146 F.3d 1368, 1377 n.2 (Fed. Cir. 1998).

3. Proof Requirements.

- a. Recovery of unabsorbed overhead is not automatic. The contractor should offer credible proof of increased costs resulting from the government-imposed delay. Beaty Elec. Co., EBCA No. 403-3-88, 91-2 BCA ¶ 23,687; but see Sippial Elec. & Constr. Co. v. Widnall, 69 F.3d (Fed. Cir. 1995) (allowing Eichleay recovery with proof of actual damages).
- b. A contractor must prove only the first two elements of the Eichleay formula. Once the contractor has established the Government caused delay and the fact that it had to remain on “standby,” it has made a prima facie case that it is entitled to Eichleay damages. The burden of proof then shifts to the government to show that the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay. Satellite Elec. Co. v. Dalton, 105 F.3d 1418

(Fed. Cir. 1997); Mech-Con Corp. v. West, 61 F.3d 883 (Fed Cir. 1995).

- c. When added work causes a delay in project completion, the additional overhead is absorbed by the additional costs and Eichleay does not apply. Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993) (Eichleay recovery denied because overhead was “extended” as opposed to “unabsorbed”); accord C.B.C. Enters., Inc. v. United States, 978 F.2d 669 (Fed. Cir. 1992).
4. Subcontractor Unabsorbed Overhead. Timely completion by a prime contractor does not preclude a subcontractor’s pass-through claim for unabsorbed overhead. E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
5. Multiple Recovery. A contractor may not recover unabsorbed overhead costs under the Eichleay formula where it has already been compensated for the impact of the government’s constructive change on performance time and an award under Eichleay would lead to double recovery of overhead. Keno & Sons Constr. Co., ENG BCA No. 5837-Q, 98-1 BCA ¶ 29,336.
6. Profit. A contractor is not entitled to profit on an unabsorbed overhead claim. ECC Int’l Corp., ASBCA Nos. 45041, 44769, 39044, 94-2 BCA ¶ 26,639; Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27,457; FAR 52.212-12, 52.212-15.

B. Subcontractor Claims.

1. The government consents generally to be sued only by parties with which it has privity of contract. Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
2. A prime contractor may sue the government on a subcontractor’s behalf, in the nature of a pass-through suit, for the extra costs incurred by the subcontractor only if the prime contractor is liable to the subcontractor for such costs. When a prime contractor is permitted to sue on behalf of a subcontractor, the subcontractor’s claim merges into that of the prime, because the prime contractor is liable to the subcontractor for the harm caused by the government. Absent proof of prime contractor liability, the government retains its sovereign immunity from pass-through suits. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944)); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

3. The government may use the Severin doctrine as a defense, however, only when it raises and proves the issue at trial. If the government fails to raise its immunity defense at trial, then the subcontractor claim is treated as if it were the prime's claim and any further concern about the absence of subcontractor privity with the government is extinguished. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944)); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
- C. Loss of Efficiency. The disruption caused by government changes and/or delays may cause a loss of efficiency to the contractor.
1. Burden of Proof. A contractor may recover for loss of efficiency if it can establish both that a loss of efficiency has resulted in increased costs and that the loss was caused by factors for which the Government was responsible. Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966). See generally Thomas E. Shea, Proving Productivity Losses in Government Contracts, 18 Pub. Cont. L. J. 414 (March 1989).
  2. Applicable Situations. Loss of efficiency has been recognized as resulting from various conditions causing lower than normal or expected productivity. Situations include: disruption of the contractor's work sequence (Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516 1993)); working under less favorable weather conditions (Warwick Constr., Inc., GSBCA No. 5070, 82-2 BCA ¶ 16,091); the necessity of hiring untrained or less qualified workers (Algernon-Blair, Inc., GSBCA No. 4072, 76-2 BCA ¶ 12,073); and reductions in quantity produced.
- D. Impact on Other Work.
1. General Rule. A contractor is generally prohibited from recovering costs under the contract in which a Government change, suspension, or breach occurred, when the impact costs are incurred on other contracts. Courts and boards usually consider such damages too remote or speculative, and subject to the rule that consequential damages are not recoverable under Government contracts. See General Dynamics Corp. v. United States, 218 Ct. Cl. 40, 585 F.2d 457 (1978); Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302; Ferguson Management Co., AGBCA No. 83-207-3, 83-2 BCA ¶ 16,819; Flores Drilling and Pump Co., AGBCA No. 82-104-3, 83-1 BCA ¶ 16,200.
  2. Exceptions. In only exceptional circumstances, especially when the impact costs are definitive in both causation and amount, contractors have recovered for additional expenses incurred in unrelated contracts. See Clark Concrete Contractors, Inc. v. General Servs. Admin., GSBCA No. 14340, 99-1 BCA ¶ 30,280 (allowing recovery of additional costs incurred on an unrelated project as a result of government delays and changes).

## **VII. CONCLUSION.**

- A. We have discussed the “tools” for a quantum case.
- B. How we go about using those tools – and the ends we seek to achieve – ultimately will determine our value to our clients.

## **APPENDIX A**

### **PRACTICAL APPLICATION EXERCISE**

Stewart & Stevenson Services, Inc.

ASBCA No. 43631, 97-2 BCA ¶ 29,252, modified by 98-1 BCA ¶ 29,653

#### 1. Summary of Facts

- Contract to manufacture trailer-mounted tactical generators (\$9.3M)
- FFP contract, negotiated procurement, performance specifications
- Schedule calls for delivery of initial production units in 150 days
- S&S delivers items after some delays, but they are of lousy quality, don't meet specs
- Generators have critical failures – underpowered engines
- Govt stops accepting units until S&S can prove they meet specs (delay)
- Govt later changes requirements regarding durability of the trailer assembly

#### 2. Entitlement Arguments

1. Impossibility of Performance (the 150 day schedule)
2. Allocation of Risk (design vs. performance specs)
3. Govt's Bad Faith (knew it couldn't be done)
4. Govt's Unilateral Design Changes (increase in trailer durability)

#### 3. Entitlement Counter-arguments

1. Schedule was not impossible to perform, if contractor had begun work before contract award (and contractor had said that it would do certain things before contract award).
2. Performance specification: risk with contractor. Contractor varied from its technical proposal and never sought permission from government when doing so. Contractor's actions at the time said that all parties understood that this was a performance spec. Government's incorporation of the technical proposal into the contract did not affect allocation of risk.
3. No government bad faith. Government knew schedule was ambitious, but did not know that schedule was not achievable. Government had watered down many portions of standard military spec, so as to facilitate a commercial product.
4. Government did make design changes (ECPs). Changes were not cardinal in nature (they were in scope changes). Contractor's performance of the design changes means they are processed under the Changes Clause. Contractor's cost proposal unrealistic.

### **Contractor's Modified Total Cost Claim**

Original Price	9.3M
Should Have Bid	10.4M
<u>What I Spent</u>	<u>30.7M</u>
Difference	20.3M

Unabsorbed Overhead	5.4M
Profit	3.8M
Interest/Borrowings	3.8M
<u>Legal Expenses</u>	<u>0.3M</u>
Subtotal	33.5M

<u>Unilateral Govt payments</u>	<u>(2.9M)</u>
<b>Claim Total</b>	<b>30.6M*</b>

**\* At the time of hearing, S&S stated that the amount now owed was over \$38M w/ CDA interest.**

**STEWART AND STEVENSON SERVICES, INC.**

Contract DAAK01-86-D-C079, Quiet Generator Sets

	<u>Bid Estimate</u>	<u>Projected Total Costs w/o Changes</u>	<u>Actual Total Costs</u>	<u>Total Increased Costs</u>
Pre-Production Costs		29,880	2,109,513	2,079,633
Material	6,016,808	6,632,262	10,981,418	4,349,156
Manufacturing Labor (Contract)			1,081,159	1,081,159
Manufacturing Labor	153,196	362,977	2,349,682	1,986,705
Quality Labor			316,134	316,134
Quality Labor (Contract)			294,472	294,472
Engineering Labor	34,860	74,969	1,047,993	973,024
Administration Support			12,254	12,254
Manufacturing Overhead	283,269	725,935	5,414,885	4,688,950
Engineering Labor (Contract)			1,206,536	1,206,536
Subcontract, Misc./Other	<u>1,292,863</u>	<u>1,292,863</u>	<u>1,133,930</u>	<u>(158,933)</u>
 Total Direct & Overhead G&A	 7,780,996 <u>1,089,339</u>	 9,118,886 <u>1,276,641</u>	 25,947,976 <u>4,706,000</u>	 16,829,090 <u>3,429,359</u>
 Subtotal Costs	 8,870,335	 10,395,527	 30,653,976	 20,258,449
Unabsorbed Overhead			<u>5,418,020</u>	<u>5,418,020</u>
 Total Costs	 8,870,335	 10,395,527	 36,071,996	 25,676,469
Profit	458,052		3,793,485	3,793,485
Cost of Money			3,719,414	3,719,414
Legal Expenses	<u>          </u>	<u>          </u>	<u>329,880</u>	<u>329,880</u>
 Total Price	 9,328,387	 10,395,527	 43,914,775	 33,519,248
 Unilateral Credits				<u>2,895,173</u>
 <b>TOTAL CLAIM</b>				 <b>30,624,075</b>



